IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9093 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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SECURITIES & EXCHANGE BOARD OF INDIA

Appearance:

1. Special Civil Application No. 9093 of 2000

MR SN SOPARKAR for Petitioner No. 1

Mrs.V.D.Nanavaty with

MR.S.N.Shelat, Sr.Counsel for Respondent

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 06/05/2002

C.A.V. JUDGEMENT

Rule. Mr.S.N.Shelat, Sr.counsel appears and waives service of rule on behalf of respondent. With the

consent of the learned counsel for the parties matter is finally heard.

2. The present petition arises against the order dated 12.11.1999 passed by the Securities and Exchange Board of India (hereinafter referred to as "the SEBI") and its confirmation by the appellate authority as per order, dated 29.2.2000.

3. Brief facts of the case are that the petitioner is a Public limited company and the respondent is SEBI constituted under the provisions of Securities & Exchange Board of India Act, 1992 (hereinafter referred to as "the Act"). In the year 1995, a public issue was floated by the petitioner-Company wherein the prospectus was filed on 22.3.95 and the issue came to be opened on 20.4.95 and closed on 24.4.95 and the allotment of shares came to be made on 26.5.95. On 25.7.97 the SEBI issued show cause notice in exercise of powers under section 11B of the Act to Managing Director of the petitioner Company to show cause as to why the direction should not be issued under section 11 of the Act to refund the issue proceeds as minimum subscription of 90% was not received till the time of closure of the issue and why the company should not be barred from entering the capital market for various violations as mentioned in the show cause notice and the attempt to create a false market etc. It is the case of the prtitioner that ultimately after receipt of show cause notice letter dated 16.8.97 was addressed to the SEBI for supplying the preliminary investigation report made in respect to the public issue by the petitioner company and it was revealed in the said preliminary investigation that though in reality the issue was not subscribed by 90%, an artificial subscription was shown by the company. The petitioner, as per letter dated 18.8.97 demanded the copy of preliminary investigation report, statements recorded and it was also mentioned that the petitioners are desirous of crossexamining certain persons who have given statements. On 8.9.97 SEBI addressed letter to the petitioner company stating that the powers under section 11B of the Act are quasi judicial powers and not judicial powers and there is no plausible reason for crossexamining the witnesses and there is no practice of allowing the crossexamination of witnesses in the proceedings under section 11B of the Act. It was also stated that all the documents which were relied upon by the SEBI have been provided to the petitioner to enable the petitioner company to send a reply and therefore the principles of natural justice have been fully followed. Thereafter, on 15.9.97 the petitioner company, once

again, addressed a letter requesting the SEBI to allow the petitioner to crossexamine by reconsidering the earlier decision communicated as per letter dated 8.9.97. On 6.10.97 ultimately the petitioner submitted reply reiterating the demand for crossexamination and supplying of certain statements and the petitioner also submitted reply to the show cause notice on merits contending that the statement of R.K.Agarwal is taken by the SEBI under acute pressure and disturbed state of mind and so was the case of Mr.Mukesh Mehta. It was also stated that the funds received by the company have already been used in the business and to withdraw the money at this stage is impossible and therefore the company may not be in a position to comply with the direction to refund and the company may have to be taken in liquidation and therefore the direction would be impracticable. That thereafter the hering was fixed but the petitioner did not avail of the same. It is the case of the SEBI that several opportunities were granted to the petitioner on 15.7.98,24.8.978, 23.10.98, 19.11.1998, 31.3.98, 29.4.99, 7.6.99, 1.7.99, 21.7.99, 30.9.99 and 15.10.99 and the matter was adjourned from time to time at the request of the petitioner, but inspite of the same, the petitioner did not avail of the opportunity granted to it and, therefore, ultimately, on 12.11.1999 the order came to be passed by the SEBI under section 11B of the Act whereby the direction is issued to the petitioner company to refund the subscription received from public issue together with interest at the rate of 15% p.a. and the direction was issued without prejudice to the right of the SEBI to initiate prosecution against the petitioner under the Act.

4. The petitioner thereafter on 3.1.2000 filed appeal under section 20 of the Act to the Central Govt which came up for hearing before the appellate authority on 25.4.2000 and ultimately on 29.5.2000 the appellate authority passed the order after hearing the petitioner. The appellate authority confirmed the findings of SEBI as made in the order dated 12.11.1999 and further observed that the opportunity of crossexamination can not be read and the principles of natural justice have been complied with by supplying the material which is used against the petitioner company and the appellate authority also found that there is strong evidence that false market was created and therefore ultimately dismissed the appeal. The aforesaid orders, dated 12.11.1999 of the SEBI and the order, dated 29.5.2000 of the appellate authority are under challenge in this petition.

5. Mr.Soparkar appearing for the petitioner mainly

raised the contentions that the order is in breach of principles of natural justice in as much as he submitted that there is absolute denial of opportunity to crossexamine the witnesses and therefore since the order has been passed in breach of principles of natural justice he submitted that the order passed by the SEBI which is confirmed by the appellate deserves to be quashed. In furtherance of this submission, he has submitted that in view of section 11(3) of the Act when the SEBI is clothed with the power of calling the witnesses, there is no reason to deprive the opportunity of crossexamination and Mr.Soparkar further submitted that since the provisions are made under section 11(3) of the Act empowering the authority to have all powers as that of a Civil Court, it is clear that the legislature intended a fullfledged inquiry which would include the right of crossexamination and therefore since the petitioner-company was entitled for crossexamination and since the opportunity has not been given, the order would be rendered in the breach of principles of natural justice and hence void. Mr.Soparkar also submitted that such an opportunity of crossexamination is more required in view of the fact that the discretion is vested with the SEB I for giving various directions under section 11B of the Act and therefore widest meaning of the principles of natural justice is called for in view of the discretionary powers of SEBI under section 11B of the Act. In support of the submission, Mr.Soparkar relied upon the judgment of the Apex Court in the matters of (i) Union of India vs T.R.Varma, reported in AIR 1957 SC 882, (ii) Khem Chand vs Union of India reported AIR 1958 SC 300, (iii) Town Area Committee, Jalalabad vs Jadish Prashad reported in AIR 1978 SC 1407, (iv) S.L.Kapoor vs Jagmohan and Swadesh Cotton Mills vs Union of India both reported in AIR 1981 SC 136 & 818 respectively, (v) Olga Tellis vs Bombay Municipal Corporation reported in AIR 1986 SC 180 and (vi) State of Kerala vs K.T.Sadhuli reported in AIR 1997 SC 1627. Mr.Soparkar also submitted that one of the grounds of denying crossexamination is the delay as stated by the SEBI. However, he submitted that the issue was of 1995 and the proceedings are initiated in 1997 and therefore when such period of two years was taken by the SEBI itself there was no valid reason for SEBI to deny the opportunity of crossexamination on the ground of delay. Mr.Soparkar also submitted that even otherwise also the company which has already used the fund for investment in the business can not be directed to refund the amount of public issue after a period of 4 years and therefore Mr.Soparkar submitted that the order for giving such direction is not only impracticable but is impossible to be conceived

under section 11B of the Act.

6. On behalf of respondent Mr.S.N.Shelat, the Ld.Sr.Counsel submitted that there is concurrent finding by both the authorities that a false market was created and therefore this court would not re-appreciate the evidence for upsetting the finding in exercise of powers under Articles 226/227 of the Constitution. Mr.Shelat also submitted that even on facts it does transpire that a false market was created by the promoters of the petitioner company at the time of public issue and he further submitted that though the issue was closed on 24.4.95 cheques were issued in the month of May, 1995 and the payment thereof was made in the month of June, 1995 by Khandwala family comprising of Shri Parmanand Khandwala, Smt.Kinnari Khandwala, Shri Vimal Khandwala and Smt.Sonal Khandwala totalling to Rs.50 lacs and Mr.Shelat submitted that if the amount of Rs.50 lacs which was shown as artificial subscription is taken out from the total subscription, the issue subscribed would be less than 90% and therefore as per the terms the company was bound to refund the money but with a view to see that the company is not required to refund the money to the public at large the aforesaid subscription of Rs.50 lacs was shown and upon investigation it was found by the SEBI that the company has indulged itself into showing artificial subscription and false capital market and therefore Mr.Shelat submitted that it is in the larger interest of public the SEBI has exercised powers under section 11B of the Act and it should not be interfered with by this court, more particularly, when such directions are confirmed by the appellate authority.

7. On the observance of principles of natural justice, Mr.Shelat submitted that all the documents upon which the reliance was placed were supplied to the petitioner company by the SEBI and Mr.Shelat further submitted that in the procedure for exercising powers under section 11B of the Act it is true that the principles of natural justice are required to be followed, however, observance of principles of natural justice vries from case to case and he submitted that in the matter like this the right of crossexamination of witnesses can not be read while observing principles of natural justice. Mr.Shelat also submitted that in any case even if it is accepted for the sake of argument that right of crossexamination is there, then also the court would not strike down the order passed by the authority unless and until it is established that any prejudice is caused to the person concerned. Mr.Shelat submitted that in any case no prejudice is caused to the petitioner and,

therefore, also the order can not be said to be in breach of principles of natural justice. Mr.Shelat submitted that, as a matter of fact, an ingenuine device is found by the company to create certain ground of breach of principles of natural justice and the same is apparent from the conduct of the company in as much as they have been wrongly pursuing the right of crossexamination and number of opportunities were given for making submissions at the time of hearing, but the company went on seeking adjournments and this shows that the company has the only intention of delaying the proceedings and to create a ground of breach of principles of natural. Mr.Shelat submitted that the perusal of both the orders of the lower authorities shows that there is sufficient explanation for artificial subscription made by Khandwala family, more particularly, the petitioner has not denied that the amount of stock invest from Khandwala family was paid in the month of June, 2000 i.e. after the closure of issue in April, 1995. Therefore, the opportunity of crossexamining them which the petitioner is pursuing is even otherwise meaningless since neither any prejudice is caused nor the said crossexamination would have any bearing upon the decision taken by the SEBI. Mr.Shelat submitted that the direction given is only of refund and the other directions as mentioned in the show cause notice for barring the petitioner from entering the capital market etc are not given and therefore when the authority which is wellversed with all relevant aspects of the subject has upon the material found that false market was created it can not be said that the order would be bad on the so called ground of denial of crossexamination of witness, more particularly when the petitioners are unable to show any prejudice caused on account of denial of crossexamination of witnesses. Mr.Shelat ultimately submitted that the orders passed by both the authorities are legal and valid and this court having limited scope of judicial scrutiny should not interfere with the orders under challenge. Mr.Shelat relied upon the judgments of the Apex Court in the matters of (i) R.V.Secretary of State for the Home Department, ex parte Mughal reported in (1973) 3 All ER 796 (ii) State of Kerala vs K.T.Shaduli reported in AIR 1977 SC 1627 (iii) A.K.Roy vs Union of India reported in AIR 1982 SC 710, (iv) Sanjay Bandekar vs Union of India reported in AIR 1994 SC 1558. Mr. Shelat relied upon the judgment in the case of R.V.Secretary(supra) to contend what could be ingredients of principles of natural justice. Mr.Shelat also relied upon the judgments of the Apex Court in the matters of(i) State Bank of Patiala vs S.K.Sharma and Rajendra Singh vs Madhya Pradesh reported in AIR 1996 SC 1669 and 2736

respectively, (ii) Aligarh Muslim University vs Mansoor Ali Khan reported in AIR 2000 SC 2783, (iii) State of UP vs Harendra Arora reported in AIR 2001 SC 2319, (iv) Neycer India Ltd vs GMB Ceramics Ltd reported in JT 2002(2) S.C. 491 and (v) H.P.Thaker vs State of Gujarat reported in 2002(1) GLH 564. The aforesaid judgments were relied upon by Mr.Shelat to contend that if any prejudice is caused on account of denial of crossexamination it must be proved by the petitioner and in the absence thereof it can not be said that the principles of natural justice are not followed or the order can not be quashed on such grounds. Mr.Shelat for contenting that the crossexamination is not an integral part of principles of natural justice relied upon the judgment of the Apex Court in the matters of (i) A.K.Roy vs Union of India reported in AIR 1982 SC 710, (ii) K.L.Tripathi vs State Bank of India reported in AIR 1984 SC 273, (iii) M/s Kanungo & Co vs The Collector of Customs, Calcutta reported in AIR 1972 SC 2136 and (iii) Surjeet Singh Chhabra vs Union of India reported in AIR 1997 SC 2560.

8. Before the rival contentions of the parties are examined it is necessary to refer to the provisions of Sections 11 & 11B of the Act:

"11. Functions of the Board--(1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of and to regulate the securities market by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions the measures referred to therein may provide for---

(a) regulating the business in stock exchanges and any other securitiese markets,

(b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets, in any manner,

(ba) registering and regulating the working of

the depositors, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification specify in this behalf,

(c) registering and regulating the working of venture capital funds and collective investment schemes including mutual funds,

(d) promoting and regulating self-regulatory organisations,

(e) prohibiting fraudulent and unfair trade practices relating to securities markets,

(f) promoting investors' education and training of intermediaries of securities markets,

(g) prohibiting insider training in securities,

(h) regulating substantial acquisition of shares and take over of companies,

(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries and self regulatory organisations in the securities market.

(j) performing such functions and exercising such powers under the provisions of Securities Contracts (Regulation) Act, 1956, as may be delegated to it by the Central Government.

(k) levying fees or other charges for carrying out the purpose of this section,

(l) conducting research for the above purposes,

(la) calling from or furnishing to any such agencies as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions;

(m) performing such other functions as may be prescribed.

(3) Nothwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) of subsection (2) the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters namely--

(i) the discovery of production of books of account and other documents at such place and such time as may be specified by the Board,

(ii) summoning and enforcing the attendance of persons and examining them on oath,

(iii) inspection of any books, registers and other documents of any person referred to in section 12 at any place,

11.B Power to issue directions--Save as otherwise provided in section 11 if after making or causing to be made an inquiry the Board is satisfied that it is necessary---

(i) in the interest of investors or orderly development of securities market, or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interests of investors of securities markets, or

(iii) to secure the proper management of any such intermediary or person it may issue such directions--

(a) to any person or class of persons referred to in section 12 or associated with the securities mzarket, or

(b) to any company in respect of matters specified in section 11A, at may be appropriate in the interests of investorsin securities and the securities markets.

9. A perusal of the aforesaid provisions show that the SEBI is enjoined with the duty of protecting the interests of investors in the securities market and to

promote the development of and regulate the securities markets by such measures as it thinks fit. Subsection (2) of section 11 provides that the SEBI may undertake various measures as provided under clauses (a) to (m). Subsection(3) of section 11 provides the enabling power of SEBI like that of a civil court under the Code of Civil Procedure for trial of the suit in respect to discovery or production of books of account etc, summoning and enforcing the attendance of persons and examining them on oath and inspection of any books or register or other documents etc. Section 11B of the Act provides that when the Board is satisfied that it is necessary in the interest of investors or orderly development of securities market or to prevent the affairs of any intermediary or other persons or to secure the proper management of any such intermediary or person the SEBI may issue such directions to any person or class of persons or to any company in respect of the matters specified in section 11A. There is no dispute raised in this petition challenging the powers of SEBI to issue directions. However, the petition is preferred mainly on the procedural aspects of breach of principles of natural justice. Before such contention of breach of principles of natural justice is dealt with I find it proper to deal with the last contention of Mr.Soparkar that after a period of about four years SEBI could not issue directions for refund of money to its investors. In this regard, it can not be lost sight of that the Act is enacted by Parliament for establishment of Authority/Board to protect the interests of investors in the securities and to promote the development and to regulate the securities markets of the matters connected therewith or incidental thereto. The constitution of Board as per the provisions of section 4 shows that the same is comprising of experts in the field and the said aspect is apparent from the perusal of section 4 of the Act. It is true that the power of appointment of vrious persons is vested with the Central Govt but at the same a perusal of the scheme of the Act shows that the Board is constituted of persons who are experts in the field of capital markets or securities markets. If any fraud is played by any company at the time of pulic issue, it is the duty of the SEBI to take proper action and also to issue necessary consequential directions because the powers of the SEBI are coupled with the public duty and the intention of the legislature is to protect the interests of investors in the securities market. In the present case at the time of public issue one of the conditions was that if the issue is not subscribed by 90% from public, then the investors or subscribers to the public issue were required to get the money refunded by

the company. The SEBI has found on examination of the record that an artificial subscription was shown by creting false capital market and if the artificial subscription is taken out from the total subscription the actual subscription was below 90% and therefore the company was bound by the condition of refunding the the money to the investors. Therefore, if the SEBI, which is expert body in the field having found that the company was bound to refund the money as per the terms and conditions of public issue, it is not open to the company to contend that the money is already invested in busness and therefore it can not be refunded now. I am afraid that such contention can be accepted when raised by the company on account of directions issued by the SEBI. If one who is party to the illegality or wrong doing raise defence that he or it is unable to make good of the benefits procured by wrong doing, the same can not be tolerated under any circumstances. If the company has used or wrongly retained the money of the investors in the public issue, I am of the view that it is within the powers of the SEBI to give such directions to the concerned company to refund the money. Merely because the period has expired and the amount is used by the company is no legitimate ground to contend that the said directions can not be issued by the SEBI in exercise of its powers under section 11 B of the Act and therefore the cotnention of Mr.Soparkar that the company can not be directed to refund the money of public issue fails and hence is rejected.

10. Much grievance is raised on behalf of the petitioner regarding breach of principles of natural justice and more particularly the denial of opportunity to crossexamine the persons whose statements were recorded by the SEBI. As such, the perusal of Section 11 B of the Act shows that the legislature has not provided for any observance of principles of natural justice while exercising powers under section 11B of the Act. In the given case it may be impracticable for SEBI to give predecisional hearing considering the emergency of the situation. However, Mr.Soparkar is right in contending that when the legislature has not provided opportunity of hearing , since the power under section 11B may ensue civil consequences such powers are to be read with the principles of natural justice, more particularly, in the present case when the action is initiated after the period of two years from the date of public issue. Therefore, proceeding on the basis that the powers under section 11B are to be exercised with the principles of natural justice, the contention of Mr.Soparkar will have to be examined as to what will be the scope and ambit of

principles of natural justice in exercise of powers under section 11B of the Act and as to whether the opportunity of crossexamination will be included in the principles of natural justice which are to be followed while exercising powers under section 11B of the Act.

11. In the case of Ravi S.Naik (supra) the Apex court has observed that the principles of natural justice have an important place in Administrative Law. They have been defined to mean "fair play in action". An order of an authority exercising judicial or quasi judicial functions passed in violation of principles of natural justice is procedurally ultravires and, therefore, suffers from a jurisdictional error. That is the reason why inspite of finality imparted to the decision of the Speakers/Chairmen by paragraph 6(1) of the Tenth Schedule such a decision is subject to judicial review on the ground of noncompliance with rules of natural justice. The Apex Court has observed that while applying the principles of natural justice it must be borne in mind that 'they are not immutable but flexible' and they are not cast in a rigid mould and they can not be put in a legal straight jacket. Whether the requirements of natural justice have been complied with or not has to be considered in the context of the facts and circumstances of a particular case. There are catena of decisions on the aforesaid subject and the law settled on the point. The ingredients of principles of natural justice vary from facts of each case and there can not be any straight jacket formula. Much emphasis is laid by Mr.Soparkar on the denial of right of crossexamination. In case of Union of India (supra) the Apex Court was dealing with the case of termination of Govt.employee and observed that the law requires that the tribunals should observe rules of natural justice in the conducting of inquiry and has further observed that the rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies. That the evidence of the opponent should be taken in his presence and that he should be given the opportunity of crossexamining the witnesses examined by that party. So far as holding departmental inquiry for termination of services of a Govt.employee is concerned there are statutory rules regarding the inquiry and further that the rules are to be read with Article 311 of the Constitution of India which is not in the present case and therefore the aforesaid judgment of the Apex Court is of no help to the petitioner. In the case of Khemchand (supra) was also the case of departmental inquiry under Article 311 of the Constitution and so was the case of

Town Area Committee, Jalalabad(supra). The case of State of Kerala (supra) was under Taxing Statute and in the said case while considering the proviso of section 17(3) of Kerala General Sales Tax Act the Apex Court observed that in the facts of the case and in view of the the scheme of Kerala General Sales Tax Act the reasonable opportunity of being heard must extend to the whole inquiry including both stages before making the best judgment assessment which would include his right of crossexamination. The scope of inquiry under a taxing statute namely Kerala General Sales Tax Act can not be equated with the inquiry contemplated under section 11B of SEBI Act and therefore I am of the view that the said judgment is of no help to the petitioner. Much reliance is placed by Mr.Soparkar upon the judgment of the Apex Court in the case of S.L.Kapoor (supra) and in case of Swadeshi Cotton Mills (supra) to contend that when the final discretionary orders are to be passed requirements of principles of natural justice should be applied to its fullest extent. However, in the aforesaid case, the Apex Court in para 24 of its judgment in S.L.Kapoor's case observed that where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue writ to compel the observance of principles of natural justice not because it is not necessary to observe natural justice but because courts do not issue futile writs. In the present case the perusal of show cause notice shows that the SEBI contemplated to issue directives for refund of money of public issue and also for barring the company from entering into the capital market and also for prosecuting the company under section 24 of the Act. As against the three contemplated action the perusal of the final order shows that the minimum action is that of directing the company to refund the money and the said action has been taken. Therefore, the question of observance of principles of natural justice may be relevant, if the maximum penalty called for is imposedc. Then, on the ground of prejudice, possibly, one might contend that the lesser penalty might have been imposed. In the case before the Supreme Court the maximum penalty of superceding the elected body was taken whereas in the present case the minimum action is taken and therefore I am of the view that the facts of the above case are different and hence the said judgment of the Apex Court is of no help to the petitioner. The case of Olga Tellis (supra) is on maintaining principles of natural justice, but it does not lay down the scope and ambit of principles of natural justice including the right of crossexamination in every case and therefore the same is of no help to petitioner.

12. As against the above, Mr.S.N.Shelat appearing for the respondent has relied upon the judgment in the case of Surjeet Singh Chhabra (supra) to contend that under the Customs Act the Apex Court has observed that failure to give opportunity to crossexamine the witnesses is not violative of principles of natural justice. In the case of K.L.Tripathi (supra) the Apex Court has observed in para 32 of its judgment that the basic concept is fair play in action administrative, judicial or quasi judicial. The concept of fair play in action must depend upon the particular lis, if there be any, between the parties. If the credibility of a person who has testified or given some information is in doubt, or if the version or the statement of the person who has testified is in dispute, right of crossexamination must inevitably form part of play in action but where there is no lis regarding the facts but certain explanation of the circumstances, there is no requirement of crossexamination to be fulfilled to justify fair play in action. When on the question of facts there was no dispute, that no real prejudice has been caused to a party aggrieved by an order, by absence of any formal opportunity of crossexamination per se does not invalidate or vitiate the decision aggrieved at fair play. In the facts and circumstances of the instant case, while observing the principles of natural justice it was not necessary for the SEBI to accede to the request of the petitioner to crossexamine the witnesses since in the facts of the present case, it can not be said that the crossexamination of witnesses could have been contemplated while observing the principles of natural justice. In view of the above, it is well settled that the courts would not issue writs in futility and therefore in this case whether denial of crossexamination has caused any prejudice to the petitioner or not will have to be considered also while testing the legality and validity of the order passed by the SEBI.

13. In case of State of UP (supra) the Apex Court observed that if nonfurnishing of inquiry report before the final disciplinary action is taken has not prejudiced to the employee, it can not be said that the order of dismissal is in violation of principles of natural justice. In case of Aligarh Muslim University (supra) the Apex Court has observed that the party complaining breach of principles of natural justice in addition to the breach of principles of natural justice, must also establish prejudice is caused on account of breach of

principles of natural justice. Therefore, ultimate analysis of various case laws comes to conclusion that the court may strike down the action of the authority if taken in breach of principles of natural justice only if the prejudice is shown or proved and the action is in breach of principles of natural justice. In the facts of the present case the whole premise of the petition from the very beginning is that of denial of crossexamiation itself is a prejudice which can not be accepted. In the facts and circumstances of the present case, however, no case is made out by the petitioner from the averments made in the petition as well as from the proceedings of the appellate authority or before the first authority namely the SEBI that on account of denial of crossexamination any prejudice is caused to the petitioner. As a matter of fact, issuance of stock invest in favour of Khandwala family on 13.5.95 and the realisation of cheque amount on 7.6.95 which are the crucial evidence are to be decided from the bank record and the same is coupled with the acceptance of MOU which is not denied by the petitioner. Therefore, considering the facts of the present case, the fact that the MOU is entered into and that the stock invest were issued on 13.5.95 and the cheques were released opn 7.6.95 in any case all these dates are after the closure of public issue on 24.4.95 coupled with existence of MOU shows that the SEBI was justified in issuing directions to refund the money . It is not the case of the petitioner that the stock invest were not of later date or that the cheques were not released on later date or that the MOU was not in existence and therefore under the circumstances I find that in any case the denial of crossexamination has not in any manner prejudiced more particularly when the SEBI has taken decision of issuing minimum direction to refund the money of public issue and has not taken any decision of barring the company from entering the capital market and of lodging prosecution. Under the circumstances, there is considerable force in the contention of Mr.Shelat that when the facts of the present case do not show any prejudice caused to the petitioner on account of denial of crossexamination to the petitioner, the court should not accept the contention of denial of crossexamination itself is sufficient to show that the prejudice is caused.

14. Mr.Shelat also submitted that from the very beginning the intention was on the part of the petitioner company to create a lacuna for assailing the order on the ground of procedural lapse and therefore an ingenuine device was found by the company for the allegation of

denial of opportunity to crossexamine. The perusal of the record shows that though the crossexamination of witnesses was not required the petitioner continued to insist upon the same. Not only that it further shows that about 11 times the matter was adjourned for making oral submissions but the petitioner company did not avail of the same and allowed the SEBI to pass the order and thereafter preferred the appeal complaining the denial of crossexamination. Overall conduct of the petitioner shows that the contention of denial of crossexamination lacks bonafide more particularly when denial of such crossexamination has not prejudiced the petitioner. Said aspect is coupled with the fact that the defence of the petitioner was that the statements of the Directors of the company were taken when they were not in sound mind and the said statements were taken under pressure. Therefore, the contention of denial of crossexamination can not be accepted even otherwise since it lacks bonafide.

15. At this stage it would be worthwhile to refer to the recent observations of the Apex Court at para 12 of the judgment in the case of Roshan Deen vs Preetilal reported in (2002) 1 SCC 100:

> "The very purpose of such constitutioanl powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by product of an erroneous view of law the High Court is not expected to erase such injustice in the name of correcting the error of law."

16. Therefore, the SEBI, which is an expert body in the field and the appellate authority which is also an expert body on the subject, itself found that in the larger interest of investors and the public, the directions should be issued to the petitioner company to refund the money of public issue which is wrongly retained by the petitioner company by creating false capital market, I am of the view that this court even otherwise also shall not undertake the judicial review as that of a court of appeal and when there is fair play in

action on the part of the authority there is no reason to set aside the directions issued by the SEBI which is confirmed by the appellate authority.

17. In the result, petition fails and Rule is discharged with costs which is quantified at Rs.10,000/-

6.5.2002 (JAYANT PATEL,J)